

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA

v.

WAYNE O. SOWERS,
Defendant

Criminal No. 96-66-P-C

GENE CARTER, District Judge

MEMORANDUM OF DECISION AND ORDER
DENYING DEFENDANT'S MOTIONS TO SUPPRESS EVIDENCE AND STATEMENTS

On October 10, 1996, a federal grand jury returned an indictment against Defendant Wayne O. Sowers, charging him with (1) possession with intent to distribute cocaine, in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(C), and 846; (2) possession with intent to distribute cocaine base, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B); and (3) possession with intent to distribute cocaine, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(C) (Docket No. 1). Defendant filed motions seeking an order suppressing evidence seized pursuant to a pat-down of Defendant's companion during a vehicle stop on the Maine Turnpike, and seeking an order suppressing statements made by Defendant while in custody (Docket Nos. 7, 8 & 10). Based on the evidence presented at the hearing, the Court concludes that Defendant's Motion to Suppress should be denied.

I. FACTS

The pertinent circumstances displayed by the evidence are as set forth below. Late in the evening of September 21, 1996, Trooper Kevin Curran of the Maine State Police was traveling in a police cruiser, headed northbound on the Maine Turnpike in Androscoggin County. Tr. at 2-3. As Curran was passing a Toyota on his right, his attention was drawn to the vehicle's loud exhaust system. Id. at 4, 6. He also noticed that there was no registration plate affixed to the front of the vehicle. Id. at 6.

Curran then conducted a vehicle stop, pulling his cruiser into the breakdown lane directly behind the Toyota, which pulled over in response to Curran's flashing blue lights. Id. at 7. He approached the vehicle and asked the operator for a driver's license and registration. Id. The operator, 42-year-old Wayne Sowers, who is the Defendant in this proceeding, produced his driver's license along with a vehicle registration identifying the vehicle's owner as Tammy Gayton. Id. at 8-9, 180. Curran observed a passenger sitting next to Sowers in the right front seat and asked her for identification. Id. at 9. The passenger, an 18-year-old woman later determined to be Sowers's girlfriend, Tammy Gayton, stated that she did not have any identification with her. Id. at 9, 149, 152. According to Curran, both Sowers and Gayton appeared "rigid and tense." Id. at 10. Curran testified that Gayton seemed "excessively nervous, more nervous than what I normally observe in traffic stops. . . . She avoided

facial contact with me, on several occasions looked away when speaking." Id.

In order to confirm Gayton's identity, Curran instructed her to step out and stand at the rear of the vehicle. Id. at 11, 91-92. Gayton stepped out of the vehicle and Sowers remained seated inside the vehicle. Id. at 11-12. While Gayton and Sowers were physically separated, Curran questioned each of them, in turn, regarding the purpose of their travel and their points of origin and destination. Id. at 12, 13-14. During this time, Gayton appeared increasingly nervous and had trouble maintaining her stance. Id. at 13. After noting the discrepancies between Gayton's and Sowers's responses to his questions,¹ Curran began to suspect that they might be involved in drug activity or some other type of criminal conduct. Id. at 14, 96. Curran then asked Gayton to stand next to his cruiser while he initiated by radio a Division of Motor Vehicles background check and completed traffic and defect cards. Id. at 14-16.

Curran indicated to Gayton that her responses had conflicted with Sowers's responses, and he asked for her consent to search the vehicle, which Gayton initially declined to give. Id. at 16-17. Curran indicated to Gayton that he suspected she and Sowers might be transporting narcotics and that he would make an application for a search warrant and would arrange for a

¹For example, Curran testified that Gayton told him that she and Sowers had begun their trip from Calais that morning, whereas Sowers stated that they had left Calais the prior evening. Tr. at 13-14.

narcotics dog. Id. at 17. Shortly thereafter, Gayton gave both verbal and written consent for Curran to search the car. Id. at 18, 157. According to Curran, Gayton's nervousness increased when she gave her consent for the search: "She became more rigid. I sensed she was much more tense and that she again had difficulty standing; she was moving much more than she had previously." Id. at 20. Curran testified that he believed at that point that Gayton could be transporting narcotics and that his belief was based upon her "excess nervousness," her body movements, and discrepancies between her statements and Sowers's statements. Id. at 20, 88-89. Curran then radioed Trooper Frank Holcomb for assistance. Id. at 22.

Curran then indicated to Gayton that he would need to perform a pat-down search of her person. Id. at 23. In conducting the pat-down, Curran felt a hard, cylindrical item in the pocket of the jacket Gayton was wearing which, he concluded, based upon his training and experience, was consistent with the packaging of narcotics. Id. at 25-26. Curran asked Gayton what was inside, and she indicated that neither the jacket nor the item inside the jacket belonged to her. Id. at 28. Curran then handcuffed Gayton, removed the package, and observed material which appeared consistent with cocaine. Id. at 28. Next, he asked Sowers to step out of the vehicle, handcuffed him, and placed him inside the cruiser. Id. at 29. At approximately 10:10 p.m., Trooper Holcomb arrived at the scene. Id. at 104. Curran conducted a search of the vehicle and found no contraband

substances. Id. at 106. Curran read Gayton her Miranda rights and she stated that she wished to consult with an attorney. Id. at 33-34. She was not questioned further at that time. Id. at 58, 162. At approximately 11:00 p.m. or shortly thereafter, Trooper Holcomb transported the Defendant, and Trooper Curran transported Gayton to the Androscoggin County Jail. Id. at 31-32, 106-7.

At approximately 1:10 a.m., Special Agents Tony Milligan and James Theiss of the Maine Drug Enforcement Agency ("MDEA") conducted an interview of Sowers in a room in the county jail booking area. Id. at 111, 113. Milligan informed Sowers that he had just finished speaking with Gayton and that she had given him a statement. Id. at 135. Milligan advised Sowers of his Miranda rights and asked a series of questions using a printed form to verify that Sowers understood his rights and was willing to waive them. Id. at 114. Sowers waived his rights pursuant to Miranda. Id. at 115, 206.

Sowers stated that he and Gayton had driven to Lynn, Massachusetts, where he had intentionally purchased \$800 worth of powdered and crack cocaine and used a portion of it, and that he had intended to buy only powdered cocaine for his own use and not for sale. Id. at 116, 117, 119. Milligan told Sowers that "because of the amount and type of drugs [seized], [the case] could be brought either in state court or federal court." Id. at 122. Milligan also explained that state charges would probably be more lenient than federal charges. Id. at 124. Milligan told

Sowers that Sowers and Gayton were "both in a lot of trouble."
Id. at 125.

The following day, at approximately 12:00 p.m., Agent Theiss returned to the jail to interview Sowers again. Id. at 138. Theiss read Sowers his Miranda rights once more and used the same written waiver form. Id. at 139, 141. Theiss mentioned to Sowers an inconsistency between Sowers's statement and Gayton's statement.² Sowers's explanation for the inconsistency was that he had been scared during the earlier interview. Id. at 143. Sowers then requested legal counsel. Id.

II. DISCUSSION

Defendant seeks to suppress tangible evidence on the grounds that: (1) it was unreasonable to detain Defendant at the scene once Trooper Curran investigated the circumstances which justified the initial stop,³ and (2) the pat-down search of Gayton was unjustified. Additionally, Defendant seeks to suppress statements he made while in custody, on the grounds that

²Gayton had stated that Sowers had made a phone call when he arrived in Massachusetts, whereas Sowers had stated that somebody had approached him. Tr. at 142.

³It should be noted that the Court is satisfied, and the Defendant concedes, that the initial stop of the vehicle was reasonable. Defendant's Post-Hearing Memorandum (Docket No. 21) at 1. An officer's observation of an incomplete exhaust system is a sufficient basis, in itself, for a stop, insofar as it provides a reasonable, articulable basis for suspecting that the vehicle's operator is violating Maine law. Tr. at 4, 7; see also 29-A M.R.S.A. § 1912(1) & (4) (prohibiting operation of a vehicle with a loud and incomplete muffler).

his statements were (1) fruits of an illegal detention or de facto arrest; (2) coerced pursuant to threats of federal prosecution; and (3) tainted by statements made by Gayton which, Defendant argues, were illegally obtained.

A. The Detention of Sowers and Gayton at the Scene

Defendant asserts that Trooper Curran's continued detention of Sowers and Gayton, beyond his initial stop of the vehicle and questioning regarding the vehicle's muffler, was unreasonable. In assessing the reasonableness of the Terry stop, the Court must examine the "totality of the circumstances confronting the police officer at the time of the stop." United States v. Trullo, 809 F.2d 108, 111 (1st Cir. 1987), cert. denied, 482 U.S. 916 (1987). The Court must then determine "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." Terry v. Ohio, 392 U.S. 1, 20 (1968).

Defendant argues that once Curran had Sowers's license and the vehicle's registration which corroborated Gayton's date of birth, Curran's further detention of Sowers and Gayton was unreasonable. According to Defendant, Curran's demand that Gayton exit the vehicle, his subsequent questioning of the two individuals, and the events which followed were not reasonably related in scope to the circumstances which justified the initial stop. Therefore, Defendant asserts, Curran's detention of Sowers and Gayton was unreasonable. The Court disagrees.

The level of an officer's suspicion and the source of such suspicion do not remain fixed throughout an encounter; instead, the level of suspicion may be heightened or diminished, and the source of suspicion changed, by the unfolding of specific events over the course of an investigatory stop. United States v. Zapata, 18 F.3d 971, 974 (1st Cir. 1994). The record in this case reveals that while Trooper Curran investigated a possible motor vehicle violation, he made observations which led him to suspect that something else might be amiss.

Curran was confronted with a 42-year-old male operating a vehicle late in the evening, accompanied by an 18-year-old female who claimed to be the owner of the vehicle, appeared "excessively nervous," and who was unable to produce any indication of her identity as the person listed as the vehicle owner on the vehicle registration. Curran testified that after he began to investigate the condition of the vehicle exhaust system, Gayton's failure to produce identification⁴ heightened his suspicion. The officer explained that, in his experience, it is common that "people who . . . state that they don't have identification subsequently are found to be either involved in some type of criminal offense or are attempting to conceal their identity." Tr. at 69. Gayton's ability to corroborate the date of birth on

⁴Curran testified that he frequently requests identification from the passenger of a vehicle during a vehicle stop. Curran estimated that he does so roughly 25 percent of the time, and he stated that he did so in this case "because of the observations of the nervousness and the lack of facial and eye contact" when he spoke to Gayton. Tr. at 10-11, 90.

the vehicle registration was not, in Curran's view, an adequate substitute form of identification. The Court recognizes that a passenger is not required by law to carry identification. As Curran stated, however, he "did not attach any significance to the fact that [Gayton] had indicated [the registration] was hers," and he "still ha[d] concern whether she was who she said she was," because, in his experience, a person seeking to conceal his or her identity will memorize another person's name or other information such as a social security number or parent's name. Tr. at 87, 88.

Beyond that, it was clearly necessary and proper for Curran to pursue an effort to ascertain Gayton's identity in order to satisfy himself that the vehicle operated by Sowers was not stolen or otherwise being operated without the consent of the owner. This was so because Gayton professed to be the person listed on the vehicle registration as the owner of the vehicle. However, that was unproven because she professed that she was unable to produce any identification. Curran had to satisfy himself that she was who she claimed to be in order to establish that her companion in the vehicle, Sowers, was legitimately operating it.

The Court concludes that, based upon the totality of circumstances confronting the officer, including Gayton's excessive nervousness, her failure to produce identification and the need to confirm her identity in order to negate the possibility that the vehicle was stolen, Trooper Curran acted

reasonably in separating Sowers and Gayton and pursuing his investigation further to determine whether a crime had been or was being committed. Moreover, the Court finds that it was reasonable for Curran to detain the Defendant and Gayton for the 30 or so minutes which elapsed from the time Curran separated the two until his suspicion was again heightened by the conflicting information he obtained. See Tr. at 166-67. The unfolding circumstances reasonably heightened the officer's suspicion of some type of criminal activity, and his decision to investigate further was reasonable once he received contradictory information from the two individuals regarding the origin of their travel. United States v. McCarthy, 77 F.3d 522, 531 (1st Cir. 1996), cert. denied, Hunter v. United States, 117 S.Ct. 771 (1997) (evasive responses reasonably heightened officers' suspicion that defendant had participated in criminal conduct).

B. The Pat-Down and Vehicle Search

Defendant contends that Gayton's consent to have her vehicle searched was coerced because Curran's statement that he would request a narcotics dog, immediately after Gayton's refusal to consent to a search, constituted an implicit threat of continued detention. Defendant also seeks suppression of tangible evidence on the grounds that the pat-down of Gayton was illegal.

It is unnecessary to reach this issue, however, as the Court concludes that Defendant lacks standing to challenge the pat-down of Gayton. In order for the Defendant to claim that the search

of the jacket Gayton was wearing violated Defendant's Fourth Amendment rights, Defendant must establish that, at the time of the search, Defendant had a "legitimate expectation of privacy" with regard to the jacket. Rakas v. Illinois, 439 U.S. 128, 143 (1978). The Court finds that the Defendant, upon lending his jacket to Gayton, relinquished control over the jacket and forfeited the reasonable expectation of privacy he had in the jacket. See Frazier v. Cupp, 394 U.S. 731, 740 (1969) (petitioner who allowed cousin to jointly use petitioner's duffel bag assumed the risk that cousin would allow others to have access to it); see also United States v. Alewelt, 532 F.2d 1165 (7th Cir. 1976), cert. denied, 429 U.S. 840 (1976) (defendant who left his jacket hanging on coat rack in public gave up control and reasonable expectation of privacy in jacket) (citing Katz v. United States, 389 U.S. 347 (1967)). Defendant may not, therefore, claim that the pat-down search of Gayton constitutes a violation of his rights.

Based upon the testimony elicited at the suppression hearing, the Court is satisfied, however, if it were to reach the issue, that Gayton's consent was voluntary.

C. Sowers's Statements in Custody

Defendant, relying upon United States v. Wong Sun, 371 U.S. 471 (1963), argues that the statements he made while in custody, confessing to the purchase, possession, and use of cocaine, should be suppressed on the grounds that they are the fruit of an

illegal detention or a de facto arrest. Having found that the detention was justified and that the Defendant lacked standing to object to the pat-down, the Court declines to suppress his statements on such grounds.

Second, the Defendant argues that his own statements were coerced because he spoke under the threat of federal prosecution and the threat that Gayton would be prosecuted, and he was told that Gayton had already made a statement. Having had the opportunity to hear the testimony and to judge the credibility of the Defendant and the MDEA agents who interviewed the Defendant, the Court concludes that this is not a situation in which the "Defendant's will was overborne at the time he confessed."

Haynes v. Washington, 373 U.S. 503, 513 (1963) (quoting Lynumn v. Illinois, 372 U.S. 528, 534 (1963)). The Court finds that the Defendant made his in-custody statements voluntarily. Moreover, the Court is satisfied that Sowers knowingly, voluntarily, and intelligently waived his rights under Miranda. Colorado v. Connelly, 479 U.S. 157, 168 (1986).

Finally, Defendant asserts that Gayton's interrogation was unlawful, since she invoked her right not to speak without counsel present, and that the illegal interrogation of Gayton impermissibly tainted Defendant's statements, since he spoke under the impression that Gayton had let the "cat out of the bag." The Court finds that this theory is inapplicable since it is intended to apply to situations in which two statements are made by the same individual. See, e.g., United States v. Bayer,

331 U.S. 532, 540 (1947) (second confession by an accused was fruit of his first confession since accused remained at a "psychological and practical disadvantage" in knowing that his secret was out and "he can never get the cat back in the bag"). In a case such as this one, where an initial statement is made by one individual, a subsequent statement made by a second individual cannot be said to be tainted by the first. Moreover, on the record before the Court, there is no indication that the MDEA agents told Sowers the content or substance of what Gayton had told them. The record reflects that when Milligan began interviewing Sowers, he merely told Sowers that he had spoken with Gayton and that she had given Milligan a "statement." Tr. at 135. The Court is satisfied, based upon this record, that Sowers's statement was not the fruit of an illegal interrogation of Gayton.

III. CONCLUSION

Accordingly, it is ORDERED that Defendant Sowers's Motions to Suppress tangible evidence and statements be, and they are hereby, DENIED.

GENE CARTER
District Judge

Dated at Portland, Maine this 21st day of February, 1997.